



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

May 12, 2003

Ms. Lisa B. Silvia
Office of Legal Services
Fort Worth Independent School District
100 North University Drive, Suite NW 130
Fort Worth, Texas 76107

OR2003-3175

Dear Ms. Silvia:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 180849.

The Fort Worth Independent School District (the "district") received a request for "all of the personnel files related to the employment of" a named individual. You state that the district has released some of the requested information. You claim that other responsive information is excepted from disclosure under sections 552.026, 552.101, 552.114, and 552.135 of the Government Code. We have considered the exceptions you claim and have reviewed the information you submitted.

We first note that some of the submitted information was created after the date of the district's receipt of this request for information. Chapter 552 of the Government Code does not require the district to release information that did not exist when it received this request or to create responsive information. *See Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983). We have marked the submitted information that did not exist when the district received this request. This letter ruling does not address the marked information, which need not be released.

Section 552.101 of the Government Code excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception encompasses information that other statutes make confidential. The federal Family Educational Rights and Privacy Act of 1974 ("FERPA") provides that no federal funds will be made available under any applicable program to an

educational agency or institution that releases personally identifiable information, other than directory information, contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. *See* 20 U.S.C. § 1232g(b)(1).

Section 552.026 of the Government Code incorporates FERPA into chapter 552 of the Government Code. *See* Open Records Decision No. 634 at 6-8 (1995). Section 552.026 provides as follows:

This chapter does not require the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974, Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g.

Gov't Code § 552.026. "Education records" under FERPA are those records that contain information directly related to a student and that are maintained by an educational agency or institution or by a person acting for such agency or institution. *See* 20 U.S.C. § 1232g(a)(4)(A). Section 552.114(a) of the Government Code excepts from disclosure "information in a student record at an educational institution funded wholly or partly by state revenue." This office generally has treated "student record" information under section 552.114(a) as the equivalent of "education record" information that is protected by FERPA. *See* Open Records Decision No. 634 at 5 (1995).¹

We have marked information that appears to have been created by a student of the district. If that is the case, then the district must not release that information unless the district has authority under FERPA to do so. *See also* 34 C.F.R. § 99.3 ("personally identifiable information" includes, among other things, "[o]ther information that would make the student's identity easily traceable"); Open Records Decision No. 224 (1979) (release of document in student's handwriting would make student's identity easily traceable). If the information in question was not created by a student, then it is not encompassed by either FERPA or section 552.114 of the Government Code.

Chapter 261 of the Family Code is applicable to reports and investigations of alleged or suspected child abuse or neglect. Section 261.201 of the Family Code provides in part:

¹In Open Records Decision No. 634 (1995), this office concluded that: (1) an educational agency or institution may withhold from public disclosure information that is protected by FERPA and excepted from required public disclosure by sections 552.026 and 552.101 of the Government Code without the necessity of requesting an attorney general decision as to those exceptions, and (2) an educational agency or institution that is state-funded may withhold from public disclosure information that is excepted from required public disclosure by section 552.114 of the Government Code as a "student record," insofar as the "student record" is protected by FERPA, without the necessity of requesting an attorney general decision as to that exception. *See* Open Records Decision No. 634 at 6-8 (1995).

(a) The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

(1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and

(2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201(a); *see also* Open Records Decision No. 440 at 2 (1986) (construing predecessor statute). In this instance, the submitted information includes reports of alleged or suspected child abuse and files, reports, records, communications, and working papers used or developed in an investigation under chapter 261 of the Family Code or in providing services as a result of an investigation. We note that the investigating agencies include the Fort Worth Police Department, the Texas Department of Protective and Regulatory Services (Child Protective Services), and the Office of Special Investigations, a division of the district's police department. *See also* Fam. Code §§ 261.301 (investigation of report), 261.406 (investigations in schools). You do not inform us of any rule adopted by the district that would permit the release of information that is subject to section 261.201 of the Family Code. We therefore assume that no such rule exists. Given that assumption, we have marked the submitted information that is confidential under section 261.201. The district must withhold that information under section 552.101 of the Government Code as information made confidential by law.

Sections 559.001, 559.002, and 559.003 of the Government Code govern access to fingerprints. These sections provide as follows:

Sec. 559.001. DEFINITIONS. In this chapter:

(1) "Biometric identifier" means a retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry.

(2) "Governmental body" has the meaning assigned by Section 552.003 [of the Government Code], except that the term includes each entity within or created by the judicial branch of state government.

Sec. 559.002. DISCLOSURE OF BIOMETRIC IDENTIFIER. A governmental body that possesses a biometric identifier of an individual:

(1) may not sell, lease, or otherwise disclose the biometric identifier to another person unless:

(A) the individual consents to the disclosure;

(B) the disclosure is required or permitted by a federal statute or by a state statute other than Chapter 552 [of the Government Code]; or

(C) the disclosure is made by or to a law enforcement agency for a law enforcement purpose; and

(2) shall store, transmit, and protect from disclosure the biometric identifier using reasonable care and in a manner that is the same as or more protective than the manner in which the governmental body stores, transmits, and protects its other confidential information.

Sec. 559.003. APPLICATION OF CHAPTER 552. A biometric identifier in the possession of a governmental body is exempt from disclosure under Chapter 552.

Gov't Code §§ 559.001, 559.002, 559.003. We have marked the submitted information that is subject to section 559.003. Section 559.002 does not appear to permit the release of this information to this requestor. We therefore conclude that the marked information is confidential under section 559.003 of the Government Code and must be withheld from disclosure under section 552.101.

Criminal history record information ("CHRI") obtained from the National Crime Information Center ("NCIC") or the Texas Crime Information Center ("TCIC") is confidential under federal law and subchapter F of chapter 411 of the Government Code. Federal law governs the dissemination of CHRI obtained from the NCIC. Federal regulations prohibit the release to the general public of CHRI that is maintained in state and local CHRI systems. *See* 28 C.F.R. § 20.21(c)(1) ("Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given.") and (c)(2) ("No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself."); *see also* Open Records Decision No. 565 at 10-12 (1990). The federal regulations allow each state to follow its own individual law with respect to CHRI that it generates. *See* Open Records Decision No. 565 at 10-12. Under section 411.097 of the Government Code, a school district is authorized to obtain from the Texas Department of Public Safety CHRI that the district is required or authorized to obtain under subchapter C of chapter 22 of the Education Code; however, a school district may not release CHRI except as provided by section 411.097(d). *See* Gov't Code § 411.097(d); Educ. Code § 22.083.

A school district also may obtain CHRI from the Federal Bureau of Investigation or any other criminal justice agency in this state. *See* Gov't Code §§ 411.083, 411.087. Thus, CHRI generated by the federal government or another state may only be released in accordance with federal law. *See* Open Records Decision No. 565 (1990). CHRI obtained from the Department of Public Safety or any other criminal justice agency in this state is confidential under subchapter F of chapter 411 of the Government Code and must be withheld under section 552.101.

Section 552.117(1) of the Government Code excepts from public disclosure the home address and telephone number, social security number, and family member information of a current or former employee of a governmental body who requests that this information be kept confidential under section 552.024. Whether a particular item of information is protected by section 552.117(1) must be determined at the time that the request for the information is received by the governmental body. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the district may only withhold information under section 552.117(1) on behalf of a current or former employee of the district who made a request for confidentiality under section 552.024 prior to the date on which the district received the present request for information. The district may not withhold information under section 552.117(1) for a current or former employee who did not make a timely election to keep the information confidential. We have marked the submitted information that the district may be required to withhold under section 552.117(1).

A social security number also may be excepted from disclosure under section 552.101 in conjunction with 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), if a governmental body obtained or maintains the social security number pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 at 2-4 (1994). It is not apparent to this office that the social security numbers contained in the submitted information are confidential under section 405(c)(2)(C)(viii)(I) of the federal law. You have cited no law, and we are aware of no law, enacted on or after October 1, 1990 that authorizes the district to obtain or maintain a social security number. Thus, we have no basis for concluding that the social security numbers in question were obtained or are maintained pursuant to such a law and are therefore confidential under the federal law. We caution you, however, that chapter 552 of the Government Code imposes criminal penalties for the release of confidential information. *See* Gov't Code §§ 552.007, .352. Therefore, before releasing a social security number, the district should ensure that it was not obtained and is not maintained pursuant to any provision of law enacted on or after October 1, 1990.

In summary, information that is confidential under FERPA must not be released unless FERPA authorizes the district to do so. The submitted information that is confidential under section 261.201 of the Family Code and section 559.003 of the Government Code must be withheld under section 552.101 of the Government Code. CHRI obtained from the federal government or another state may only be released in accordance with federal regulations.

CHRI obtained from the Texas Department of Public Safety or another criminal justice agency in this state is confidential under subchapter F of chapter 411 of the Government Code and must be withheld under section 552.101 of the Government Code. Some of the submitted information may be excepted from disclosure under section 552.117(1) of the Government Code. A social security number may be excepted from disclosure under section 552.101 in conjunction with section 405(c)(2)(C)(viii)(I) of title 42 of the United States Code. The rest of the submitted information is not excepted from disclosure and must be released. As we are able to make these determinations, we need not address your other arguments against disclosure.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

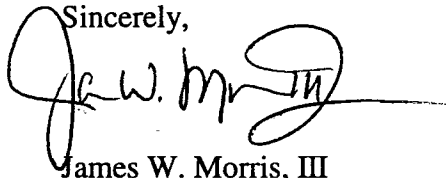
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "J.W. Morris, III", with a long horizontal flourish extending to the right.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 180849

Enc: Submitted documents

c: Ms. Dawn Tongish
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(w/o enclosures)